

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

PROMOCO MANUFACTURING CO.  
Employer

and

Case 34-RC-2279

SHOPMEN'S LOCAL UNION NO. 832 OF THE  
INTERNATIONAL ASSOCIATION OF BRIDGE,  
STRUCTURAL, ORNAMENTAL & REINFORCING  
IRON WORKERS  
Petitioner

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DECISION ON CHALLENGES AND OBJECTIONS

Statement of the Case

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Hartford, Connecticut on April 13, 2009.

The Petition in this case was filed by Shopmen's Local Union 832 of the International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers, (herein Union or Petitioner) on July 29, 2008. Pursuant to Stipulated Election Agreement approved by Regional Director on August 7, 2008, a secret ballot election was conducted on September 4, 2008. Of approximately 26 eligible voters, 11 votes were cast for Petitioner, 11 votes were cast for the Employer and 4 votes were challenged. The challenged votes are sufficient in number to affect the results of the election. The involved bargaining/voting unit is:

All full-time and regular part-time production and maintenance employees employed by the employer at the 300 Morgan Lane, West Haven, Connecticut facility, but excluding all other employees, office clerical employees, temporary employees, and guards, professional employees and supervisors as defined in the Act.

On September 11, 2008, the Petitioner filed 10 timely Objections to the Election. Thereafter, on December 17, 2008, with the approval of the Regional Director, the Petitioner

withdrew Objections 1, 2, 3, 4 and 9. Pursuant to Section 102.69 of the Board's rules and regulations, an investigation of the challenges and remaining Objections was conducted. Subsequently, on December 24, 2008, the Regional Director issued his Report on Challenged Ballots and Objections and Order Directing Hearing. This Report sustained the challenge to the vote of Michael Kosa and overruled Objection 7, and directed that a hearing be held in the matter of the Petitioner's challenges to the votes of John Mayo, Walter Mahon and the Employer's challenge to the vote Albert Rivera, and the Objections Nos. 5, 6, 8 and 10. By Decision and Order dated February 19, 2009, the Board adopted the Regional Director's Report.

#### *A. The Challenged Ballots.*

Promoco is a small metal manufacturing business located in West Haven, Connecticut, that has been owned and operated by Don Charbonneau and his family for many years. Promoco produces metal products, usually to order, ranging from aircraft parts, ground support for the aircraft industry, stairs and railings, and also performs some structural work. Don Charbonneau's wife, Mary, does bookkeeping and other office functions for Promoco. She also operates a separate business on the Promoco property called Pro Iron. This company is a union shop that installs some of the products that Promoco manufactures as well as doing installation for other customers.

As of the time of the election, Promoco employed about 30 employees, in addition to the Charbonneau family members who work there. Don Charbonneau's son James is a supervisor and is in charge of the work in the various areas of the Company's facility. Another son, John, is the primary estimator for the Company. At the Company's business location are four separate buildings, each dedicated to a discrete function. Building 1 contains the machine shop where employees work at manufacturing metal parts, as well as the administrative offices. Building 2 is where the precision sheet metal and welding work occurs and Building 3 nearby is where the precision sawing and welding work takes place. Finally, contained on a lower level of Building 4 are the employees dedicated to heavy fabrication work, including painting, assembly and crane work. Building 4 also has an office where the Board election was held.

#### *1. John Mayo*

John Mayo is employed by Promoco as a shop foreman in the machine shop. He has been a long time employee of the Company. The number of employees in the machine shop has fluctuated over time between three and five. At the time of the election, there were four employees in the shop other than Mayo. These employees are classified as machinists and toolmakers. The shop workers report directly to Mayo, and the other Promoco employers, primarily welders and fabricators report directly to James Charbonneau. Mayo reports to Don and James Charbonneau. Each machine shop employee has a work table where he or she works. Mayo also has a work table and works along side the other employees. Additionally he has a desk in the same area. He also has a telephone and computer whereas the other employees do not.<sup>1</sup> Mayo works from 7am to 5 pm, six days a week. The other employees in the machine shop work the same hours. Mayo does not punch a time clock whereas the other employees in the shop do. He is a salaried employee whereas the other employees in the shop are paid hourly. Mayo testified that being salaried rather than hourly was a condition he demanded upon his employment with the Company. Mayo is in charge of the other employees

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<sup>1</sup> Mayo uses the computer primarily to send information about job quotes to the company's main customers.

in the shop and can direct their work, including telling them how to do their job. Upon request, he also gives Don Charbonneau oral performance evaluations of the employees whom he oversees. Mayo is also consulted by Don Charbonneau when machine shop employees seek a raise in pay.

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Mayo does toolmaking and machinist work, but also spends time estimating the cost of projects that customers bring in and quoting prices for them. James and Don Charbonneau's other son, John, also provide estimates for customers. Mayo's time spent estimating and directing the work of the other employees versus the time he is himself engaged in production varies from 25% to 75% and varies daily.

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Mayo assigns work to the other employees in the shop. Mayo can change assignments after consulting with James Charbonneau. The consultation is to ensure that there are no conflicts in work assignments. Anyone wanting the services of one of the employees in the machine shop must ask Mayo before they can receive those services. He can allow an employee to leave early, after consultation with James Charbonneau. He has only disciplined an employee on one occasion and that was about twenty years ago. On that occasion he fired an employee for not following Mayo's instructions and ruining a very valuable piece of product. He did not consult anyone before firing this individual. He does not hire employees though he is consulted in the hiring decision.

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Mayo meets once a month with the Charbonneau's. Other employees are not present for these meetings. At these meetings, the men discuss blueprint design, job priority and the quantity and type of materials needed to complete the jobs on tap and whether some of the work needs to be subcontracted. Mayo also meets regularly with James Charbonneau to prioritize work projects and to decide whether to have employees in the shop work overtime. They also discuss jointly how much overtime to schedule and how many employees get the overtime work. Mayo testified that if James Charbonneau is not available for consultation, he can assign overtime on his own. This situation arises about six times a year. The request for overtime is made by Mayo based on his individual knowledge of the customer's need to have a job completed. When overtime is approved, Mayo individually decides which employees get the overtime work. This decision is made based on Mayo's assessment of the capabilities of the employees working under him.

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Based on the totality of the facts adduced with respect to Mayo, I find that he does not share a mutuality of interest with the other machine shop employees with respect to wages, hours and working conditions and is a statutory supervisor whose primary interests are aligned with management. He has the authority to independently direct the work of the machine shop employees and exercises such authority daily. This includes deciding which employee works on which job and when overtime is called for, Mayo decides which employee or employees get the overtime work. He has apparent disciplinary authority as he terminated the employment of one employee he supervised without first getting approval of his superiors. He testified that he has not had to discipline any other employee as no occasion has arisen to warrant discipline.

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His opinion is sought by higher management when they want to evaluate a machine shop employee and is also sought when such employees seek a wage increase. He is a salaried employee whereas the supervised employees are hourly and punch a time clock. Mayo does not have to punch the clock. He has a desk, a computer and telephone whereas the other employees do not. He meets monthly with higher management to plan the work of the machine shop whereas the other employees of the shop are not consulted in this regard. He meets regularly with James Charbonneau to prioritize work and decide whether overtime is called for. He can and periodically does grant overtime without consultation with higher management and

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can and periodically does grant machine shop employees the right to leave work early. Because I find him to be a statutory supervisor, he is excluded from the bargaining unit by the terms of the unit description. I sustain the challenge to his vote and recommend that his vote should not be counted.

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## 2. Walter Mahon

Walter Mahon is a long time employee of Promoco and has the title of Inspector, a quality control position. He shares an office with the Company's purchasing agent, its designer or draftsman and James Charbonneau. He works nine to five, four days a week and is a salaried employee.<sup>2</sup> He decides which days he works based on the work schedule of the Company. Production employees work hourly, generally from 7 am to 3:30 pm. Mahon reports directly to Don Charbonneau. He testified that the hourly workers for the Company are provided benefits if they want them. Those that take them pay part of the cost and the Company pays part. The company has no uniforms or clothing policy though most employees wear a work apron in the shop to protect their clothes. Mahon himself dresses casually with no safety shoes or other clothing called for by production work.

Mahon has no supervisory duties or authority. He spends about half his work time in the office and the rest in the shop area. In the office, he checks out the job, blueprints and specifications, and then goes to the floor. When in the shop he checks incoming materials to insure they are the correct materials for the jobs at hand, inspects work in progress to insure it is meeting specifications and inspects finished product to see if it meets specifications. If Mahon finds that a work in progress in the machine shop is not being done properly, he reports that to Mayo who then works out the problem with the involved employee. Major problems are reported to Don or James Charbonneau. When Mahon returns to the office from the floor, he fills out necessary paperwork. When on the floor, he interacts with the production workers by inspecting their work and sometimes asking them to help him in some fashion.

Mahon is a toolmaker by trade and worked his way up in the company to the Inspector position doing toolmaking. He testified that he considers himself a production employee even though he does not engage directly in production on a regular basis. He testified that on occasion, he might finish a product for another employee because of his long experience as a toolmaker. This would involve him working on a milling machine or a lathe. He testified that on average he does this type work three or four hours a week. When doing this type work, he is working next to other employees doing similar work. He has a toolbox as do all the other toolmakers and machinists.

The Union challenges the vote of Mahon on the grounds that he is a statutory supervisor and additionally, does not share a community of interest with the other employees. The first reason asserted is simply wrong. Mahon is not a supervisor. As opposed to Mayo, he does not independently direct the work of other employees. Instead, his contact with other employees is to inspect their work in progress and the finished product. About half of his time is spent in contact with the other employees performing his inspection function. The remainder of his time is spent checking on materials and doing paperwork in the office. He regularly, though sparingly, performs production work. There is no showing that he possesses any supervisory authority and does not meet any of the criteria for statutory supervisory status. Therefore, I find that he is not a statutory supervisor and thus not excluded from the bargaining unit for that reason.

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<sup>2</sup> Mahon became salaried about 15 years ago, when he went to a four day workweek.

With respect the issue of community of interest, Mahon is a regular part-time employee. He is salaried rather than hourly and does not regularly wear the working clothes usually worn by production workers. He clearly does not fall into any of the excluded categories of employees contained in the stipulated bargaining unit. In a case that is similar on this point, *Venture Industries*, 327 NLRB 918 (1999) the Board overruled the findings of a lack of community of interest by the Hearing Officer and found nine employees in positions similar to Mahon to be properly included in the unit. The unit in *Venture Industries* was stipulated and was described as follows:

All full-time and regular part-time employees employed by the Employer at its facility located at 10230 North Holly Road, Grand Blanc, Michigan, but excluding office clerical employees, professional employees, confidential employees, sales employees, draftsmen, guard and supervisors as defined in the Act.

The nine employees in that case held titles as follows: production control; customer service representative, safety technician; continuous improvement team coordinator; quality system coordinator; and product engineer. The hearing officer in that case found that none of the nine employees fell into any of the excluded categories of employees in the unit description. Each of the nine was salaried as opposed to the most employees being hourly. They had the same benefits as all salaried employees and did not receive overtime pay. Many of the nine perform little or no production work and contact with production employees was limited. One of the employees involved was involved with quality control and had an office in the administrative building. This employee reported to the employer's Operations Manager. In his job, he performed audits and worked with quality managers to make sure the quality control system in place was working and to make sure the employees were in compliance with customer requirements. Another of the nine was the employer's product engineer. This employee had a cubicle in the administration building and reported to the Operations Manager. This employee worked with the employer's engineering staff, vendors and customers. She was responsible for assuring that the Employer had the necessary materials to produce its products and that production lines were set up properly to produce parts.

In overturning the decision of the hearing officer, the Board stated:

"It is well established that, when resolving determinative challenged ballots in cases involving stipulated bargaining units, the Board will rely on the scope of the stipulation itself, with its various inclusions and exclusions, unless it is contrary to any express statutory provisions or established Board policies.' *Wells Fargo Alarm Services*, 289 NLRB 562 (1988). When the objective intent is clear, the Board will hold the parties to their agreement. If, however, the objective intent is ambiguous, the Board will apply the community of interest doctrine in order to resolve the challenged voter's eligibility status."

"Here, as the hearing officer noted, the parties agreed to the inclusion of 'all full-time and regular part-time employees' and none of these employees worked in any of the classifications that the election stipulation specifically excluded from the bargaining unit. .... Thus, based on the plain language of the stipulation itself, we conclude that the intent of the parties to include these employees is clear and unambiguous. As the second Circuit stated in *Tidewater Oil Co. v. NLRB*, 358 F 2d 363, 366 (1966):

'In our view no established Board policy or goal of the Act is contravened by including [the employee]. We view community of interest as a doctrine useful in drawing the borders of an appropriate bargaining unit, a function well within the discretion of the Board. But we do not conclude that the doctrine remains as an established Board policy sufficient to

override the parties' intent when the Board, in the interest of furthering consent elections, allows the parties to fix the unit.'

The Petitioner has not shown in this case that the inclusion of these employees would be inconsistent with 'any express statutory provisions or established Board policies.' See *Wells Fargo Alarm Services*, supra. Accordingly, we overrule the challenges to the ballots of these nine employees and direct that their ballots be opened and counted. "

I believe that the Board's ruling in *Venture Industries* applies in the circumstances of the instant case. The unit description is unambiguous and clear. Accordingly, I recommend that the Petitioner's challenge to the vote of Mahon be overruled and that his ballot be opened and counted.

### 3. Albert Rivera

Don Charbonneau testified that Albert Rivera had been an employee of Promoco in the past, left, and came back about a year prior to the September 4, 2008 election and then left again in the spring of 2009. He was a welder, layout man and fabricator, and was paid hourly. In the period leading up to the August rush to complete a large project named the Greenberg Conference Center project<sup>3</sup>, Rivera suggested to Charbonneau that he hire two Puerto Rican friends of Rivera's to help. Their names were George Ruiz and Mashi Fernandez. The two potential hires spoke little or no English, so Charbonneau suggested to Rivera that he would hire them if he would be their lead man or supervisor while they were employed. They were employed in June to help on the Greenberg Conference Center project and in addition, some metal work for five schools that had contracted with Promoco for railings. During the employment of the two men, Rivera directed their work activities. Rivera read the involved blue prints, did the layout work and told the men what to do. Charbonneau testified that Rivera also worked nights and would do the set up for two other persons hired for the Greensburg Conference Center project and tell them what to do. These two employees were Abderrazak Darwano and Drummond Travis Shaw. According to Charbonneau, Rivera was responsible for directing the work of the night time part-time workers as he was the only person with experience in the Company's work on duty at night.

Rivera during this period worked day times and directed the work of the two Puerto Rican workers hired on his recommendation and then worked nights along with the part-time night workers. Charbonneau testified that at least during this time frame in August 2008, Rivera had the authority at night to let the night time employees come in late or leave early without seeking permission from any one else. He also had the authority to assign and direct the work of the two day time Spanish speaking employees and the part-time night time employees. The two Spanish speaking employees left the company in October, 2008 to return to Puerto Rico. They were still employed on September 4, 2008 and were on the excelsior list and voted in the election.

Rivera did not testify and it was represented by the Union's counsel that he was unavailable as he was incarcerated at the time of the hearing.

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<sup>3</sup> This project required a great deal of welding work and was the cause for hiring several people. It was to be completed by the end of August 2008 and thus as that deadline neared, a great deal of work had to be done as the project was behind schedule.

Darwano testified that Albert Rivera worked as a fabricator for Promoco and Darwano had seen him working at a work table. According to Darwano, Rivera never gave him orders or told him what to do. Those instructions came from either James or Don Charbonneau. Shaw similarly testified that Rivera was a shop welder/fabricator for the Company. According to Shaw, he did not receive orders or direction from Rivera and did not see Rivera give others direction. Shaw testified, without any showing of how he would know, that Rivera could not hire, fire or direct the workforce. According to Shaw, Rivera punched a time clock.

I believe from the evidence that Rivera was not a statutory supervisor, but instead was a leadman where the two Spanish speaking employees were concerned. It is clear that he gave them direction instead of it coming from James or Don Charbonneau simply because Rivera speaks Spanish and evidently the Charbonneau's did not. The testimony of Shaw and Darwano refutes the notion that Rivera supervised the part-time employees. Other than the direction he gave to the Spanish speaking employees because of his linguistic abilities, Rivera was not shown to be anything other than a normal welder/fabricator. I do not find this direction to be sufficient to support a finding of supervisory status and do find he was properly in the bargaining unit and recommend that his vote be counted.

#### B. The Objections

The Objections at issue are as follows:

Objection 5. An eligible voter was told that he could not vote.

Objection 6. Two eligible voters were left off the Excelsior List.

Objection 7. Two eligible voters were laid off the week of the election.

Objection 8. The Employer told an eligible voter that he could not vote and told him to leave the premises.

Objections 5, 6, 7, and 8 relate to the status of Drummond Travis Shaw and Abderrazak Darwano, who Petitioner contends were eligible to vote in the election. More specifically, Objection 6 refers to the fact that the names of Shaw and Darwano were not included in the list of eligible voters which the Employer was required to submit prior to the election, and Objections 5 and 8 allege that an employee (D. Travis Shaw) attempted to vote, but was precluded from doing so by the Employer.

Objection 10. The employer engaged in threatening conduct.

Objection 10 alleges that the Employer engaged in threatening conduct prior to the election. More specifically, the Union alleges that shortly before the pre-election conference the Employer, on the shop floor and in the presence of employees, loudly sought to eject the Petitioner's representatives from the premises and threatened to call the police.

1. Objections 5, 6, 7 and 8 are related and will be discussed together below.

#### *a. Were Darwano and Shaw Eligible to Vote?*

Drummond Travis Shaw began working for Promoco on July 3, 2008. He worked part-time, from about 4 pm until 9 pm. He was also fully employed in the day by another employer. He was referred to Promoco by a former Promoco employee. Shaw interviewed with James

Charbonneau. After the interview, he was told that he would hear from Don Charbonneau in a couple of weeks. Shaw testified that in the interview process, there was no mention that the work he was applying for was temporary. There was also no mention that the work was to be ongoing for an indefinite period of time. The closest thing to a reference to long term employment came from a conversation he had with Don Charbonneau. On the day he went to work for Promoco, Don Charbonneau asked him if he knew two other former Promoco employees, named Baskin and Walden. Shaw answered that he did. According to Shaw, Charbonneau asked if he knew anything about the Union and did he want to work for Charbonneau's outside division, represented by the Iron Workers union. (This evidently refers to Mrs. Charbonneau's business located on the Promoco property.) Shaw knew that Walden was a member of that union.

On August 27, 2008, Shaw asked Don Charbonneau about full-time work with Promoco. According to Shaw, Charbonneau told him he would have to wait until the election was over to determine what he was going to with Shaw as a full-time employee. According to Shaw, he then asked Charbonneau why there was going to be a union election. The answer as recorded in the transcript reads: "And he's like, oh, the guys want a union. And I asked him why. And he said, he mentioned something about I guess they're having money problems and, you know, these guys don't understand if they would just work twenty more hours overtime, that they wouldn't have any money, you know, issues." Shaw testified that Charbonneau told him that he would not be eligible to vote in the election as he had not been there long enough. Shaw informed the Union about this claim of ineligibility and the Union never got back to him about it.

Shaw testified about a meeting at the time clock with Darwano and James Charbonneau. He testified that Charbonneau told them not to report for work on Monday because they were waiting on blueprints. He instructed them to call in the following Thursday or Friday or stop in and he would tell them if he had any work or find them something to do. On cross examination, Shaw testified that he was never told that he would have a job at Promoco forever. He did not take being told that further work for him was dependent on getting blueprints to mean his employment had ended. He assumed that when the blueprints arrived, he would be called back to work. He testified that he was not laid off by Charbonneau. He also testified that James Charbonneau told him that there were future projects he would be needed for.

On the Monday after the election, Shaw telephoned the facility to see if there was work. He spoke with the secretary who said that James Charbonneau was busy and would get back to him. He did not get a return call, so Shaw called back in on Wednesday and reached James Charbonneau. He asked if there was work and according to Shaw, Charbonneau responded, "Dude, I'll call you back when I'm ready." On cross, this exchanged changed to: "Dude, I'll call you when I need you." Shaw did not wait for Charbonneau's call and called again in a couple of days. He left a message and did not get a return call.

Shaw testified that two individuals were hired as welders after him and Shaw believes they are still working at the Company. He testified that these two persons were doing the same work as him most of the time that he was employed by Promoco. According to Shaw these two employees were also part-time and worked the same hours as did he. Although Shaw has not physically been back to the Company since September 4, he bases his belief that the two are still employed on an answer that an employee gave him when he called for James Charbonneau. He reached this employee by phone and asked him for Charbonneau's number. Shaw then asked the employee if the two were still employed and the employee said they were still working. These employees, if they exist, were not named in the record.



Shaw testified that he was a certified welder when he was hired by Promoco and was qualified to do the heavy welding. He testified that indeed that is what he did for the month he was employed by Promoco. He and Darwano worked together. Though he was not sure, he believed that the work he and Darwano were doing was for one project.

Abderrazak Darwano began working for Promoco on July 31, 2008 as a welder. He worked about four hours a day. He had applied for work and been interviewed by Don Charbonneau in the week or two prior to being hired. According to Darwano, he was not told when he was interviewed or hired that the work would be temporary. He is a friend of Travis Shaw and had worked with Shaw at Derecktor Shipyard in Bridgeport, Connecticut. Shaw was hired to work at Promoco about the same time as Darwano. In August, after Darwano had passed his welding test given by the Company, Don Charbonneau asked him if he knew other qualified welders. Darwano then brought in two other welders to work at Promoco. These two also worked part-time.

On or about August 30, 2008, at the Company's timeclock, Darwano had a conversation with James Charbonneau. Travis Shaw was present for this conversation. According to Darwano, Charbonneau told them that though the Company had been given a job, they did not have blueprints for that work for the next week, and that they should call him the next week for a date to return to work. Though not expressly stated by Darwano, he and Shaw were evidently temporarily laid off on that day. Darwano came in the next week to see if the blueprints had come in and was told by Don Charbonneau that they had not. About two months later, Darwano again inquired if work were available and was told no. He indicated that Don Charbonneau advised him to check back in January. The next time he spoke with Don Charbonneau was in January 2009, when he went to the Company for his W-2 form or similar form. Darwano denied that on this occasion that he told Charbonneau that the Union had called him to vote in the election.

Darwano testified that he did not vote in the election and was told by James Charbonneau before the election that he should not come in to work until the company had work for him. He was not contacted by the Union about the election.

While working part-time for Promoco, Darwano had another full-time job. At Promoco, he worked from 4 pm or 5 pm to 9 pm, Mondays, Saturdays and sometimes Sundays. His job was as a MIG welder. This type welding involves welding together very thick pieces of metal. This welding process is specialized and required experience Darwano had gained at his shipyard employment. Upon arrival at work on the days he worked, Darwano would punch a timecard and put on the card the job number he was working on. That number remained the same during his employment with Promoco.

Don Charbonneau testified that he first met Darwano and Shaw when they applied for work and hired them some two weeks later. They were hired because the Company had fallen behind schedule on a job to make structural beams for the Greenberg Conference Center at Yale University. Specifically they were hired to weld "moment" connections. Moment connections involve welding a steel plate to an I beam or a tube column. They are critical welds using steel an inch and a half thick. Each weld is inspected by a third party inspector. The welders on this type work have to be certified for welding unlimited thickness metal. Both Darwano and Shaw were properly certified for this type welding. The steel beams they worked on were due to be fully installed by September 1. Therefore, August was "crunch time" for welding.

Charbonneau testified that both Darwano and Shaw were told they were hired for a

particular job that Promoco had to get out the door and that they could work as many hours as they wanted. They worked nights until about 9 pm and did some Saturday and Sunday work. Darwano worked 82.15 hours between July 31 and August 30, 2008. Shaw worked 115 hours in the same time period. All of this work time was devoted solely to the Greenberg Conference Center project.

Charbonneau testified that Darwano and Shaw were hired only for the Greenberg Conference Center job with no intention of keeping them on when moment connections for the job were completed. This work was completed at the end of August 2008. The Greenberg project began in June or July and the part that used moment connections was scheduled to be completed by September 1. However, some parts of the project were still ongoing as the date of hearing in this case. The school jobs were still ongoing as of the same date and there is ongoing work for Sikorsky Helicopter. Charbonneau said the plant population stayed about thirty during the summer of 2008 and dropped in September. He was unable to specify how many people left or when.

Don Charbonneau did not tell Shaw and Darwano that they were laid off at the end of August, but believes his son James did inform them of that fact. Charbonneau testified that there was ongoing welding work at the Company after Darwano and Shaw were laid off, but that they were not good at the type of welding that was involved, a different kind than they had performed at Promoco while they were on the payroll there. Neither of the two men could read a blueprint according to Charbonneau and that was required for the ongoing welding work. He testified they were fine heavy welders, but did not have the skill set to do the regular welding work Promoco needed. Charbonneau testified that he did not tell Shaw and Darwano that there would be work for them at Promoco after the work was finished for the Greenberg Conference Center project. James Charbonneau did not testify.

I find from the evidence that Shaw and Darwano were hired temporarily and specifically to do "moment" welding for the Greenberg Conference Center project. I believe Don Charbonneau's testimony that he informed them of that fact. His testimony is consistent with the undisputed facts. Work for the Greenberg project is all the work they did for Promoco and their layoff at the end of August is consistent with the fact that the moment welding had been accomplished. Don Charbonneau had a rational business reason for not keeping them on after the moment welding was completed as they were not qualified to do the work remaining on that and other projects in house at the end of August. Considering them temporary workers for one project is also consistent with not including them in the excelsior list. Other employees hired during the summer of 2008 were included in the list and were eligible to vote. These employees were working on the date of the election and thereafter. Evidently they possessed the skills that Shaw and Darwano did not possess in order to continue the other work of Promoco.

Under the circumstances presented here, I do not find applicable the Board's standard test for determining voter eligibility as set out in *Davison-Paxon Company*, 185 NLRB 21 (1970). Though the two involved workers performed unit work, the duration of their employment was fixed, that is, it ended with the completion of moment welding on the Greenberg Conference Center project. Any future employment with Promoco, because of their skill set or lack thereof, would be dependent on Promoco getting a project that called for more moment welding than it could handle with its existing regular workforce. I find this too speculative to give Shaw or Darwano any reasonable expectation of again being employed by Promoco. The Board has held that an individual's relationship to the job must be examined to determine whether the employee performs unit work with sufficient regularity to demonstrate a community of interest with remaining employees in the bargaining unit. *Pat's Blue Ribbon*, 286 NLRB 918 (1987),

citing *Mid-Jefferson County Hospital*, 259 NLRB 831 (1981). See also, *Caribbean Communications Corp.*, 309 NLRB 918 (1987) (employee hired to complete a filing project not eligible to vote because termination after completion of project was inevitable.)

5 Having found Darwano and Shaw to be temporary workers, based on the cases cited and because temporary workers are specifically excluded from the involved unit, I find them ineligible to vote in the September 4 election.

*b. Were the Names of Darwano and Shaw Improperly Omitted from the Excelsior list?*

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Charbonneau was never notified by anyone prior to the election that Shaw and/or Darwano should have been on the excelsior list. His wife Mary compiled the list and omitted the names of Darwano and Shaw. As they were not eligible to vote, their names were properly omitted.

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*c. Did Don Charbonneau Improperly Tell an Employee He Could Not Vote?*

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On the day of the election, September 4, 2008, the Union called Shaw to come to the facility and vote. Shaw told the Union representative that Charbonneau had declared him ineligible to vote, but the representative told him to come to the facility and vote anyway. Shaw went to the Company's facility between 4 pm and 4:30 pm, just before the ending time for the election. He went into the shop building and did not see any activity, so he went back out to find the election location and then he encountered Don Charbonneau, who asked him why he was there. Shaw said he was going to vote, and Charbonneau said no, that he was not eligible and could not vote. Shaw then left the facility. Shaw denied that this conversation took place in Building four on a staircase.

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With respect to this issue, Don Charbonneau testified that he and his wife waited on September 4 until the election ended at 4:30 and then went down to the election site. According to Charbonneau he ran into Shaw on a staircase in Building 4 and asked Shaw what he was doing. Shaw answered that he was there to vote. Charbonneau looked at his watch and told Shaw that it was after 4:30 and asked him who told him to come to the facility to vote. According to Charbonneau, Shaw said that the Union did. According to Charbonneau, he then told Shaw, "Okay, I guess you missed it." Shaw then left the premises. Charbonneau denies ever telling Shaw that he was ineligible to vote and further denied that the matter ever came up between the two men. He denies that he was ever angry with Shaw on September 4 and never told him to leave the premises. According to Charbonneau, Shaw likewise was not angry when told the election was over and stated, "I guess I missed it."

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Having found Shaw indeed ineligible to vote, I find that Charbonneau was within his rights to tell that fact to Shaw as Shaw testified he did. On the other hand, I believe Charbonneau's version of what occurred over that offered by Shaw. Had the meeting between Charbonneau and Shaw taken place outside Building 4, it would have been seen by Union representatives who observed Shaw arrive at the facility, enter a building, come out and leave the facility. The one Union representative who testified did not testify that he saw an encounter between Shaw and Charbonneau. Further, it would have been logical for Charbonneau to ask Shaw what he was doing at the facility as Shaw was no longer employed by Promoco at that time. It would also have been logical for Charbonneau to have looked at his watch and tell Shaw that the election was over as Charbonneau and his wife did not go to Building 4 until 4:30, the cut off time for the election. Even the Union representative who testified in the hearing, testified that he did not see Shaw enter a building until 4:25 and to the best of my knowledge, the building he saw him enter was not Building 4.

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Based on the findings made above, I recommend that the Petitioner's Objections 5, 6, 7, and 8 be overruled.

5           2. Objection 10 – The Employer Engaged in Threatening Conduct

Anthony Rosaci is employed the International Union as representative and serves locals throughout New England, including the local Union involved in this case. On September 4, Rosaci went to the Employer's West Haven facility to participate in the election in the company of the International Union's organizer, Kenneth Livingston and a member of Local 832, Wayne Legault. The election was to be held in an office in Promoco's Building 4. At about 3pm, the three Union men went into the Employer's office. The election was scheduled to be conducted from 3:30 pm to 4:30 pm. A pre-election conference was also scheduled for about 3 pm. The Employer's receptionist (the owner's wife) told them that the NLRB representatives were not on site nor were the owner and his attorney. She added there would be no meeting. Rosaci went out of the office and called the Board agent assigned to conduct the election to report a problem accessing the election site. The Board agent arrived shortly and the Union men entered the office with the agent. There they met the Employer's owner, Don Charbonneau who took them out of the office and led them to the building where the election was to be held.

Rosaci described the interior of that building as open with work benches and machinery to perform iron work. According to Rosaci, just as the men entered the shop and continuing until they reached the election location, Charbonneau began shouting "what are these guys doing here; I don't want them here; I want them out of here; if you don't leave, I'm going to call the police." These remarks were directed to the three Union men.<sup>4</sup> Rosaci indicated that he observed five or six of the Employer's employees from eight to twenty feet away as Charbonneau was yelling. According to Rosaci, these employees could hear Charbonneau. How Rosaci could be sure they heard Charbonneau was not disclosed and no employees who may have been present were called to testify. According to Rosaci, the yelling continued when they got to the election site and the Board agent counseled Charbonneau to take it easy, pointing out that the Union men would be leaving when the election began. At this point they had the pre-election conference and the Union designated Wayne Legault to be its observer. The agent inquired whether Legault was an employee and Rosaci said he was not, pointing out that Legault was a member of Local 832. The Board agent indicated that might be a problem and called his supervisor for advice. Rosaci then decided not to use Legault and told the agent that the Union would not have an observer. Charbonneau then told the agent that the Employer's observer would be one of Charbonneau's sons. The agent said that would be a problem as well, and Charbonneau substituted an office worker.

At this point, the three Union men left the Employer's property and went to a parking lot across the street from the Employer's facility. Rosaci testified that Travis Shaw is an employee of Promoco. They saw him arrive at the facility about 4:25 pm and observed him enter the facility. He came back out in about one minute and the Union men wondered how he could have

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<sup>4</sup> On cross examination, the Employer's attorney suggested to Rosaci that Charbonneau was objecting to the number of Union men present and did not object to just one being there. Rosaci testified that this point was made well after the shouting started. This point was made again after the election when the votes were being counted. At this point, Rosaci agreed with Charbonneau that they would stay for the count and the other people from the Union and the Company would leave the area. According to Rosaci, he had the other two Union men leave, but that Charbonneau broke the agreement and kept his wife and son present.

voted that quickly. At about 4:30 or a few minutes after that time, the election ended and the Union men went back into the facility. As they made their way to the office where the election had been held, an unidentified person yelled at them that they did not have the right to be there. The continued on anyway and got to the election location.

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On September 4, 2008, Don Charbonneau arrived at the Company's facility about 3 pm. He had been in a meeting and returned specifically for the election which he understood was to start about 3:30 pm. At that point the Board agent had not arrived. When he got to the facility at 3 pm, he saw three men he did not know. It turned out to be Rosaci and the two men who accompanied him to the election. Charbonneau testified that he walked up to them and introduced himself. Then he went into his office. From that vantage point he saw the Board agent arrive and went out to meet him. They met and the agent wanted to go to the office where the election would be held. Nothing was said until they reached the entrance of Building 4 where the election would be held. Charbonneau had been advised by his labor counsel that only one Union representative would be allowed in. So Charbonneau objected when all three Union representatives went in. Then he called his counsel on a cell phone and was speaking with him as the group walked to the election office. Charbonneau asked the Board agent to speak with his counsel. According to Charbonneau, he did. The agent got off the phone and said the others would leave at 3:30 pm and it was about 3:25 pm at this point. This decision upset Charbonneau so he told the agent and the three Union representatives that unless two of the Union men left immediately, he would call the cops. Charbonneau testified that he was not using a loud voice or yelling. He testified that it was very noisy in Building 4 at the time of his confrontation.

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Charbonneau prepared to leave when the agent told him that his son James could not be the Company's observer. So Charbonneau called down the Company's Purchasing Agent, Dwight Palshaw. Charbonneau then went to his office to await the conduct of the election. He assumes the three Union representatives left the building at 3:30 pm.

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The Union's final objection is to Don Charbonneau's conduct in objecting to the presence of Union representatives in the shop. "The burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one. The objecting party must show, inter alia, that the conduct in question affected employees in the voting unit and had a reasonable tendency to affect the outcome of the election." *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005)(internal citations omitted).

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"In determining whether a party's misconduct has the tendency to interfere with employees' freedom of choice, the Board considers: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subject to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. *Taylor Wharton Division*, 336 NLRB 157, 158 (2001).

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Looking at the evidence in light of the guidance of the cited case, I found that Petitioner has failed in its burden of proof. There was only the one incident described above. It was not severe and did not involve employees, only the Employer's owner, the three Union representatives and the Board agent. There was no proof offered that any potential voter overheard Charbonneau's statements, and no proof offered that his statements affected any voter. Even if the statements were heard by potential voters, what was said did not involve them

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and was not a threat against them. Significantly, the Board agent must not have thought that the statements posed a threat to a fair election or he would have taken some action. He did not. I recommend that Objection 10 be overruled.

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### Conclusions

Based on the above, I recommend that the Petitioner's objections be overruled and that the ballots of Walter Mahon and Albert Rivera be opened and counted. The Regional Office, after opening and counting the ballots of Mahon and Rivera, shall issue an appropriate certification.<sup>5</sup>

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Dated, Washington, D.C., September 28, 2009

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Wallace H. Nations  
Administrative Law Judge

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<sup>5</sup> Under the provisions of Section 103.69 of the Board's Rules and Regulations, Exceptions to this Report may be filed with the Board in Washington, D.C. within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by October 13, 2009.